(8)

No. 87-6571



# In the Supreme Court of the United States

OCTOBER TERM, 1988

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DETHORN GRAHAM, PETITIONER

*v.*

M.S. CONNOR, ET AL.

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether a police officer violates the Constitution if he uses unreasonable force, as measured by an objective standard, when making an arrest or investigative stop.

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## INTEREST OF THE UNITED STATES

This case requires the Court to determine the general constitutional standard applicable in an action alleging that police officers used excessive force to make a seizure of a person. Here, that question arises in a civil action for damages under 42 U.S.C. 1983. The same question, however, is often presented in cases under 18 U.S.C. 242, which makes it a federal crime to violate a person's constitutional rights. The United States prosecutes numerous cases under 18 U.S.C. 242 that involve the use of excessive force. See, *e.g.*, *United States* v. *Dise*, 763 F.2d 586 (3d Cir.), cert. denied, 474 U.S. 982 (1985); *United States* v. *Calhoun*, 726 F.2d 162 (4th Cir. 1984); *United States* v. *McQueeny*, 674 F.2d 109 (1st Cir. 1982); *United States* v. *Golden*, 671 F.2d 369 (10th Cir.), cert. denied, 456 U.S.

919 (1982). Indeed, in the last four years, the United States has received over 10,000 excessive-force complaints and has prosecuted 111 such cases. In addition, the United States Department of Justice defends excessive-force actions brought against federal law-enforcement officers and the United States.

## STATEMENT

1. Since this case arises on review of a decision upholding a directed verdict for respondents, the evidence must be viewed in the light most favorable to petitioner. See *Whitley* v. *Albers*, 475 U.S. 312, 322 (1986). So viewed, the record shows the following. On November 12, 1984, Dethorn Graham (petitioner), who is a diabetic, felt the onset of an insulin reaction (Pet. App. 2a). Graham can usually treat such a reaction by eating or drinking something that contains sugar (*ibid.*). If left untreated, however, the condition can lead to a coma or even death (*ibid.*).

Once Graham learned that he was having an insulin reaction, he asked his friend, William Berry, to drive him to a nearby store so that he could buy some orange juice (Pet. App. 2a). Berry agreed, but when Graham arrived at the store and saw a number of people ahead of him in line, he left, returned to the car, and asked Berry to drive him to a friend's house (*ibid.*).

Respondent Connor, a Charlotte police officer, saw Graham hastily enter and leave the store. Officer Connor was suspicious so he followed Berry's car and stopped it about one-half mile from the store (Pet. App. 2a). Although Berry told Office Connor that Graham was suffering from a "sugar reaction," Officer Connor nevertheless ordered Berry and Graham to wait until he (Connor) could find out what, if anything, had happened at the



store (*ibid.*). Graham, who became concerned that he was not free to leave to treat his insulin reaction, got out of the car, ran around it twice, and then sat quietly on the curb as he lost consciousness (Tr. 78-79).

A number of Charlotte police officers, including respondents Townes, Matos, Chandler, and Rice, then arrived on the scene (Pet. App. 3a). One of those officers rolled Graham over on the sidewalk and cuffed his hands behind his back (Tr. 79). When Graham regained consciousness, he found that he had been handcuffed and that the cuffs were "real tight" (*id.* at 5). The officers then lifted him up his shoulder and placed him face down on the hood of Berry's car (*id.* at 8, 80). One of the officers held him by the handcuffs; every time he tried to speak, that officer "would pull up on him" (*id.* at 83). When he asked the officer to check in his wallet for proof that he was diabetic, one of the officers instead "slammed" his face into the hood of the car (*id.* at 7, 83-84). An officer said: "Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up" (*id.* at 80). Four officers then grabbed him and threw him into a police car "like a bag of potatoes" (*id.* at 7, 81).

While Graham was in the police car, one of his friends arrived with orange juice, but the officers refused to let him have it (Tr. 8, 81). At this point, when the officers learned that Graham had done nothing wrong at the store, they drove him home, removed his handcuffs, and released him (*id.* at 10, 81-82). As a result of his encounter with the police, Graham's foot was broken, his wrists were deeply cut, his forehead was bruised, his right shoulder was injured, and he developed a loud ringing in his right ear that continues to this day (*id.* at 10B-13).

2. Graham filed this action under 42 U.S.C. 1983 against respondents—five Charlotte police officers and

the City of Charlotte. He alleged that the officers had used excessive force, in violation of "rights secured to him under the Fourteenth Amendment to the United States Constitution" (Complaint 5).[1] The case was tried before a jury. At the close of Graham's evidence, respondents moved for a directed verdict (Pet. App. 3a). In ruling on that motion, the district court set forth four factors that it believed to be relevant to excessive-force claims: (1) the need for the use of force, (2) the relationship between such need and the amount of force that was used, (3) the extent of the injury inflicted, and (4) "[w]hether the force was used in a good-faith effort to maintain and restore discipline, or maliciously and sadistically for the very purpose of causing harm" (*id.* at 12a-13a). The district court found that the amount of force used by the officers in this case was "appropriate under the circumstances," and "was not applied maliciously or sadistically" (*id.* at 13a-14a). Thus, the district court granted respondents' motion for a directed verdict (*id.* at 15a).

3. A divided panel of the Fourth Circuit affirmed (Pet. App. 1a-8a). The majority stated that the district court had considered the proper factors in ruling on Graham's constitutional claim (*id.* at 4a-5a).[2] And the majority held that the district court had reached the correct result (*id.* at 5a). The majority stated: "[A] reasonable jury

[1] Petitioner also asserted state common law claims for assault, false imprisonment, and intentional infliction of emotional distress. Those claims are not before this Court.

[2] The court of appeals did not tie its constitutional analysis to any particular provision of the Constitution. The court noted, however, that because Graham had not been incarcerated, his complaint of excessive force did not "aris[e] under the eighth amendment" (Pet. App. 4a n.3).



weighing the evidence * * * could not find that the force applied was constitutionally excessive" (*id.* at 6a (footnote omitted)).[3]

Judge Butzner dissented. He stated that "[i]t was error to require Graham to prove that * * * the police acted 'maliciously or sadistically for the very purpose of causing harm' " (Pet. App. 6a (citation omitted)). Judge Butzner believed that Graham's claim must be analyzed under the Fourth Amendment, and he stated that an officer's use of unreasonable force during an investigative stop violates that amendment even if the officer does not act maliciously or sadistically (*id.* at 7a). After reviewing Graham's evidence, Judge Butzner concluded that a jury could find that the officers used unreasonable force and that "the police caused [petitioner's] injuries" (*id.* at 8a).[4]

## SUMMARY OF ARGUMENT

The Fourth Amendment prohibits police officers from making unreasonable seizures. That provision governs both the issue of whether officers may seize a person and also the issue of how they effect such a seizure. It has been clear at least since *Tennessee* v. *Garner*, 471 U.S. 1 (1985), that if an officer uses unreasonable force to seize a person—*i.e.*, to arrest or stop him—the officer violates the Fourth Amendment.

The issue whether an arresting officer used reasonable force in making an arrest or a stop must be examined under an objective standard. The mental state of the particular officer is not relevant to the inquiry. The Fourth

[3] The majority noted, however, that its "decision should not be read as unqualified approval of the conduct of the Charlotte officers" (Pet. App. 6a n.5). Indeed, the majority found "that the conduct of the police officers was far from commendable" (*id.* at 2a).

[4] The Fourth Circuit denied petitioner's request for rehearing en banc by a 7 to 5 vote (Pet. App. 16a).

Amendment allows an officer to use such force as a reasonable and prudent person would use under the circumstances. Thus, the court of appeals in this case erred in approving a standard that requires an examination into whether the officer acted maliciously or sadistically.

A properly instructed jury could reasonably return a verdict in favor of Graham by finding that respondents used unreasonable force when they stopped him. Accordingly, the court of appeals erred in affirming the award of a directed verdict to respondents. The judgment should be reversed and the case remanded for trial.

## ARGUMENT

### A POLICE OFFICER VIOLATES THE FOURTH AMENDMENT IF HE USES UNREASONABLE FORCE, AS MEASURED BY AN OBJECTIVE STANDARD, WHEN MAKING AN ARREST OR INVESTIGATIVE STOP.

#### A. *The Fourth Amendment Was Implicated When the Officers Detained Petitioner*

The Fourth Amendment prohibits police officers from making "unreasonable searches and seizures." And the term "seizure" has a well-defined meaning: "Whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee* v. *Garner*, 471 U.S. 1, 7 (1985). See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975). Here, respondent police officers plainly seized petitioner, for purposes of the Fourth Amendment, when they stopped him and placed him in handcuffs.

Many of this Court's decisions involving the Fourth Amendment deal with the issue whether government officials may conduct a search or make a seizure. See, *e.g.*, *United States* v. *Karo*, 468 U.S. 705 (1984); *Delaware* v. *Prouse*, 440 U.S. 648 (1979). Those cases give content to the "reasonableness" standard by requiring the officer to have a justification—*e.g.*, probable cause or reasonable suspicion—before he can conduct a search or make a seizure. But the Fourth Amendment is concerned not only with *whether* government officers may conduct a search or seize a person but also *how* the search or seizure is effected. The Court made that point clear in *Tennessee* v. *Garner*, 471 U.S. at 8 (citations omitted; emphasis added): "We have described 'the balancing of competing interests' as the 'key principle of the Fourth Amendment.' Because one of the factors [in the balance] is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, *but also how it is carried out.*"[5] Thus, if an officer uses unreasonable force to carry out an otherwise lawful seizure, the officer violates the plain terms of the Fourth Amendment. See *Lester* v. *City of Chicago*, 830 F.2d 706, 713 (7th Cir. 1987); *Kidd* v. *O'Neil*, 774 F.2d 1252, 1256-1257 (4th Cir. 1985); *Robins* v. *Harum*, 773 F.2d 1004, 1007-1010 (9th Cir. 1985).



#### B. *The Fourth Amendment Requires An Objective Standard Of Reasonableness*

The issue whether an arresting officer acts reasonably in making a seizure does not depend on the officer's state of mind. Rather, when a Fourth Amendment claim is asserted, "it is imperative that the facts be judged against an objective standard." *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). See also *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 541 (1985) (citation omitted) ("we are dealing with a constitutional requirement of reasonableness, not *mens rea*"). Accordingly, this Court has consistently evaluated Fourth Amendment claims under an objective standard of reasonableness without regard to the mental

[5] The Court in *Garner* held that the Fourth Amendment is violated by the use of deadly force to stop a suspect not reasonably believed to be dangerous.

state of the law-enforcement officer.[6] See, *e.g.*, *Tennessee* v. *Garner, supra*; *Winston* v. *Lee*, 470 U.S. 753 (1985) (unreasonable to perform surgery under general anesthetic to recover evidence of a crime); *Schmerber* v. *California*, 394 U.S. 757 (1966)) (reasonable to perform blood test when there is probable cause to believe suspect was driving while drunk).

The court of appeals in this case, therefore, erred in approving a standard that includes an examination into whether the officer acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm" (Pet. App. 4a). The mental state of the particular officer is simply beside the point for the purpose of deciding whether that officer used unreasonable force in arresting or detaining a suspect. We can imagine cases where an officer uses unreasonable force (*e.g.*, deadly force to arrest a misdemeanant) without acting "sadistically" or "maliciously". On the other hand, we can imagine cases where an officer enjoys inflicting injuries on an arrestee even though the amount of force he uses is entirely reasonable in the circumstances. As stated by the court of appeals in *Lester* v. *City of Chicago, supra*, the Fourth Amendment permits "that degree of force a reasonable

[6] The Eighth Amendment's prohibition against "cruel and unusual" punishment, by contrast, may involve a subjective element. In *Whitley* v. *Albers*, 475 U.S. 312 (1986), the Court considered the standard for assessing excessive-force claims in the context of a prison riot. The Court held that, under the Eighth Amendment, the question is whether the "force [is] applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm" (475 U.S. at 320-321). But differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms "cruel" and "punishment" point to a subjective standard; "unreasonable" does not.



and prudent person would have applied in effecting the arrest" (830 F.2d at 709).[7]

### C. *Other Proposed Constitutional Tests For Examining The Force Used To Make A Seizure Should Be Discarded*

The courts of appeals have applied different tests in constitutional cases alleging that police used excessive force to make an arrest. For example, the Eleventh Circuit in *Gilmere* v. *City of Atlanta*, 774 F.2d 1495, 1500 (1985), held that excessive force that "shocks the conscience" violates substantive due process.[8] Accord *Gumz* v. *Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985). The Fifth Circuit has required a plaintiff in an excessive-force case to prove that he suffered a "severe injur[y]." See *Shillingford* v. *Holmes*, 634 F.2d 263, 265 (1981). And other courts, including the Fourth Circuit in this case (Pet. App. 4a), have asked whether the officer acted maliciously or sadistically. See also *Gumz* v. *Morrisette*, 772 F.2d at 1400. Those approaches, which have been rejected in other circuits (see *Lester* v. *City of Chicago, supra*) should be rejected by this Court.

The "shocks the conscience" standard traces its origin to *Rochin* v. *California*, 342 U.S. 165, 172 (1952), where the Court held that pumping a suspect's stomach to obtain

[7] This case does not present the question whether a person may have a Fourth Amendment claim for negligently inflicted injuries. See generally *Daniels* v. *Williams*, 474 U.S. 327, 334 (1986) (holding that mere negligence does not violate the Due Process Clause, but leaving open the question whether "other constitutional provisions * * * [c]ould be violated by mere lack of care"). Here, respondents deliberately seized Graham and deliberately used force in doing so.

[8] The Eleventh Circuit in *Gilmere* further examined the plaintiff's excessive-force claim under the Fourth Amendment test that we propose. See 774 F.2d at 1502.

evidence "shocks the conscience" and therefore violates substantive norms under the Due Process Clause. The *Rochin* case, which involved the exclusion of evidence in a criminal trial, was decided before this Court held that the standards of conduct laid down by the Fourth Amendment, and the rules of enforcement developed under it, are fully applicable to the states (see, *e.g.*, *Mapp* v. *Ohio*, 367 U.S. 643 (1961)). Today, there is no doubt that the Fourth Amendment applies to the states and commands that police seizures of persons be reasonable. Hence, the Fourth Amendment specifically addresses the question presented[9] and provides a workable standard so that the Court need not resort to elusive and amorphous concepts of substantive due process. We recognize that the Fourth Amendment's reasonableness standard does not eliminate all hard cases, but that problem is "insignificant compared to the randomness that flows from asking people what shocks their consciences" (*Gumz* v. *Morrissette*, 772 F.2d at 1406 (Easterbrook, J., concurring)).

The "severe injury" requirement is also inappropriate. Under that standard, a police officer could, without any justification, beat a person on the head with a club if the

[9] The Fourth Amendment's protection against unreasonable force applies "throughout the time that the arrestee is in the custody of the arresting officers." *Robins* v. *Harum*, 773 F.2d 1004, 1010 (9th Cir. 1985). It is unclear whether the Fourth Amendment also protects a pre-trial detainee from the use of unreasonable force. See *Bell* v. *Wolfish*, 441 U.S. 520, 556-557 (1979). In any event, the Due Process Clause protects a pre-trial detainee from the use of excessive force that amounts to punishment (*id.* at 535-539). See also *United States* v. *Stokes*, 506 F.2d 771, 776 (5th Cir. 1975). After conviction, the Eighth Amendment furnishes the principal protection against the use of excessive force. See *Whitley* v. *Albers*, 475 U.S. 312, 327 (1986); *Hudson* v. *Palmer*, 468 U.S. 517, 530 (1984). Throughout a person's custody, constitutional protections are better placed in specific constitutional provisions rather than in a vague guarantee of substantive due process.



beating causes only a bruise. Similarly, a police officer could terrorize a nondangerous suspect by pointing a gun at his head if the chambers of the gun are empty. In short, acceptance of the standard would allow the unreasonable use of force in cases where police conduct poses a grave risk and causes terror or even physical harm, but where the person seized, by chance, does not suffer a "severe injury".[10]

The approach focusing on the officer's intent—*i.e.*, whether he acted maliciously or sadistically—is also flawed. As we noted above (p. 7-8, *supra*), the Fourth Amendment demands an objective inquiry. Moreover, an objective inquiry permits the courts to develop and "sustain bright line rules of conduct" (*Gumz* v. *Morrissette*, 772 F.2d at 1407 (Easterbrook, J., concurring)). See, *e.g.*, *Tennessee* v. *Garner*, *supra*. By contrast, a test that concentrates on a particular officer's state of mind can lead to unpredictable results by creating "no clear end to the relevant evidence" (*Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 (1982)) and by making summary judgment very unlikely (*id.* at 815-819).

### D. *A Jury Should Receive Clear Guidance On The Law Of The Fourth Amendment*

The Fourth Amendment's reasonableness requirement is a workable method for assessing claims for damages allegedly caused by a police officer's use of excessive force in making an arrest. State courts have operated successfully under an analogous common law rule.[11] Never-

[10] This is not to say that every push or shove violates the Constitution. Cf. *Ingraham* v. *Wright*, 430 U.S. 651, 674 (1977). ("There is, of course, a de minimis level of imposition with which the Constitution is not concerned").

[11] A number of state courts have endorsed the view that, under the common law, "an officer may only use the force reasonably necessary to accomplish the arrest, with due regard to other attendant circum-

theless, the courts must take care that a jury does not substitute its view of proper police behavior for a reasonable view of a police officer on the scene. See *Terry* v. *Ohio*, 392 U.S. at 23 (Fourth Amendment does not require that "police officers take unnecessary risks in the performance of their duties").

Accordingly, the jury should receive careful guidance from the court. As a general matter, we agree with the jury instruction found in a leading treatise—3 E. Devitt, L. Blackmar, & M. Wolff, *Federal Jury Practice and Instruction* 961-962 (1987):

> [I]n making a lawful arrest an officer has the right to use such force as is necessary under the circumstances to effect the arrest. Whether or not the force used in making an arrest was * * * unreasonable * * * is an issue to be determined by you in the light of all the surrounding circumstances, on the basis of that degree of force a reasonable and prudent officer would have applied in effecting the arrest under the circumstances disclosed in this case.

Beyond that instruction, the court should tailor its instructions to the facts of the particular case. For example, here

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stances, such as his own safety or that of others present." *City of Mason* v. *Banks*, 581 S.W.2d 621, 625 (Tenn. 1979). Accord *Jackson* v. *District of Columbia*, 412 A.2d 948 (D.C. 1980); *Dauffenbach* v. *City of Wichita*, 233 Kan. 1028, 667 P.2d 380 (1983); Restatement (Second) of Torts § 132 (1965) (arresting officer may use force that he "reasonably believes to be necessary"). Of course, common law standards developed in the states are not uniform and the Constitution does not simply incorporate common law torts. See *Daniels* v. *Williams*, 474 U.S. 327 (1986). But the experience of at least several state courts shows that the Fourth Amendment's reasonableness standard is workable in cases alleging that police officers used excessive force to make an arrest.



the trial court should instruct the jury that the officers were justified in stopping petitioner to investigate his behavior.[12]

As a further example, in a case where the evidence shows that a suspect resisted the police or attempted to flee, the jury should be told that the police were permitted to use reasonable force to subdue him. In judging whether the force used was reasonable, the jury should consider the harm to the suspect, the extent to which he was a threat to the police and to others, and the availability of less forceful means to subdue him. The jury should assess those matters from the perspective of a reasonable officer on the scene, not in light of hindsight from the calm of the jury room. *Terry* v. *Ohio*, 392 U.S. at 20-22. Thus, if the suspect seems likely to flee, an officer may use force to subdue him even if it turns out that the suspect really had no such intent. Similarly, if the suspect acts as if he is armed, the officer may respond accordingly even if it turns out that the suspect was not armed. At the end of the day, however, if the evidence would support a jury verdict in favor of the plaintiff, it is the jury that must decide whether the officer's use of force was reasonable.[13]

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[12] The parties in this case agree that the officers had reasonable suspicion to stop petitioner.

[13] Respondents have not asserted a defense of qualified immunity. Such a defense, however, may be appropriate in some cases alleging the use of excessive force to make an arrest. See generally *Varela* v. *Jones*, 746 F.2d 1413, 1418 (10th Cir. 1984) ("police officers are not civilly liable if they act upon a reasonable belief that the amount of force they used is reasonable under the circumstances"). An officer is most likely entitled to qualified immunity in a case such as *Tennessee* v. *Garner*, *supra*, where he uses force that is allowed under a state law that is only later determined to be unconstitutional.

E. ***Petitioner Introduced Enough Evidence To Defeat Respondents' Motion For A Directed Verdict***

The court of appeals erred in its review of the evidence in this case. The court resolved credibility issues,[14] weighed testimony,[15] and drew inferences in favor of respondents.[16] That analysis was inconsistent with this Court's statement regarding directed verdicts in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962): "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to [the party against whom a directed verdict was sought] and give [that party] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn."

When the evidence is viewed in the light most favorable to Graham, it shows that the police officers handcuffed him while he was unarmed and calm. The officers put the handcuffs on too tightly, lifted him up by his shoulder, and put him face down on the hood of a car. They then pulled him up by the handcuffs whenever he tried to speak, slammed his head against the hood of the car when

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[14] The majority discredited Berry's testimony that Graham was calm because Berry had once told the police that Graham was "having fits" (Pet. App. 5a).

[15] Graham testified that the officers "slammed" his head into the hood of the car. The majority discounted that testimony, however, because Berry testified that "he heard no impact with the car" (Pet. App. 5a).

[16] The majority stated that the evidence does not show that the officers caused Graham's foot injury (Pet. App. 5a). But that is only one possible inference from the evidence. A reasonable jury could instead infer that the officers' actions (particularly lifting Graham up by the handcuffs when he tried to speak and throwing him into the police car) caused or contributed to that injury. In any event, there is no doubt that a jury could find that the officers caused his other injuries.



he asked them to check his wallet for proof that he was a diabetic, threw him into a police car, and refused to allow him to have the juice he needed to treat his insulin reaction. Their actions caused him to suffer a broken foot, deeply cut wrists, an abrasion over the eye, an injured shoulder, and a loud ringing in his ear.

Since respondents have not yet introduced any evidence, there may be another side to the story. And even if respondents present no evidence, the jury is free to credit or discredit Graham's evidence. But on the basis of the evidence presented so far, a reasonable jury could return a verdict in his favor by finding that the officers used unreasonable force.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for a new trial.

Respectfully submitted.

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